

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
GEORGE SANTOLI,

Index No. 118596/03

Plaintiff(s),

-against-

NOTICE OF
ENTRY

VJB CONSTRUCTION CORP.,

NEW YORK
COUNTY CLERK'S OFFICE

DEC 14 2007

NOT RECORDED
WITH CO-FILE

PLEASE TAKE NOTICE that annexed hereto is a true copy of the Decision and Order of the Honorable Shirley Werner Kornreich duly entered in the office of the Clerk of the within named Court on December 12, 2007.

Dated: New York, New York
Thursday, December 13, 2007

Yours, etc.,

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM : PART 54

-----X
GEORGE SANTOLI,

Plaintiff,

-----X
-against-

VJB CONSTRUCTION CORP. and KAJIMA
DEVELOPMENT CORP.,

Defendants
-----X

Index No. 118596/03
MOTION

111 Centre Street
New York, New York
December 6, 2007

B E F O R E:

HONORABLE SHIRLEY WERNER KORNREICH, Justice

A P P E A R A N C E S:

HACH ROSE

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FILED

DEC 12 2007

**COUNTY CLERK'S OFFICE
NEW YORK**

ALSO PRESENT:

O'CONNOR, O'CONNOR, HINTZ & DEVENNEY

One Huntington Quadrangle-Ste 1C07
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BY: MICHAEL T. REAGAN, ESQ.
Attorney At Law

(Continued on the following page.)

MLB

ALSO PRESENT: (Cont'g)

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MARK L. BOWIN
Official Court Reporter

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Proceedings

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2 THE COURT: Okay. We're on the record at
3 the request of moving party in this reargument
4 motion.

5 MR. DEVEREAUX: Actually, the other counsel
6 requested it. I don't object to it.

7 THE COURT: Okay. You are moving now to
8 reargue the Court's decision August 20; correct?

9 MR. DEVEREAUX: It's dated August 6. It
10 was entered August 20; correct. I'm not sure when it
11 was served.

12 It's the decision dated August 6th granting
13 Spieler's cross-motion for summary judgment. We're
14 moving to reargue -- to revisit that decision --

15 THE COURT: When you say "we," you --

16 MR. DEVEREAUX: 475 Ninth, VJB and the
17 Kajima entities.

18 Right now I think the only remaining entity
19 is 475. We're moving for reargument and denial of
20 plaintiff's summary judgment motion.

21 Plaintiff testified in his deposition on
22 pages 71 and 72 that he slipped -- I'm sorry.
23 Plaintiff testified he slipped on BX cable.

24 Spieler testified, at pages 71 and 72 on
25 the EBT testimony attached as Exhibit 8 to the
26 papers, that only they used BX cable on the project.

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Spieler's contract, which is attached in Volume 2, Exhibit 5, establishes that Spieler agreed to remove, at least weekly, all rubbish and surplus and material, including the BX cable, from the project.

Accordingly we argue that the evidence therefore establishes that the BX cable was left there by Spieler because they agreed to remove their rubbish surplus materials, at least briefly, from the site; therefore; it was there more than a week, two weeks, three weeks, four weeks, whatever the duration of time; they certainly have a duty to remove it. To the extent that plaintiff fell due to that BX cable, therefore, there's a duty there by Spieler, and they should not be granted summary judgment.

Plaintiff's testimony that Spieler was not working where plaintiff was injured is irrelevant because Spieler was at all times required to remove their BX cable from the site.

Plaintiff's testimony that he believed VJB was allegedly behind in some schedule or something with respect to other rubbish or materials of other subcontractors is totally irrelevant to the duty of Spieler to comply with their contract and their duty to remove their BX cable they also used on the job at

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2 least weekly, if not more so, as directed by the
3 construction manager.

4 This all creates an issue of fact which
5 requires denial of the cross-motion for summary
6 judgment by Spieler, your Honor.

7 That's our motion in a nutshell.

8 THE COURT: Can I hear from the other side?

9 MR. REAGAN: Good morning, your Honor. My
10 name is Mike Reagan, O'Connor, O'Connor, Hintz &
11 Deveney. I represent Spieler and Ricca.

12 At the outset, I would just state -- as you
13 know, there are extremely complicated matters in this
14 case, not so much with regard to the points
15 Mr. Devereaux is raising but the subsequent events
16 which have taken place after your last decision and
17 order which had dismissed all claims against my
18 client.

19 And I guess with that in mind, I would ask
20 your Honor, respectfully, to try to let us go through
21 our points because I think we're all on the same page
22 here with regard to myself and plaintiff's counsel
23 and the co-defendants.

24 And I would also request --

25 THE COURT: Let me start with this.

26 There was a settlement, I thought, of this

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case on November 9th.

MR. REAGAN: That's correct, your Honor.

THE COURT: Now, did 475 settle or not?

MR. ROSE: I think I'm in the best position to answer this, your Honor.

I represent the plaintiff in this matter; and prior to trial, there was a settlement agreement reached between the plaintiff's employer, R & J Construction, that the plaintiff specifically agreed, number one, to accept for the amount of \$750,000 and that we would release both R & J Construction and 475 Ninth Avenue Associates.

We then proceeded to trial in the caption before your Honor. And regarding the settlement, this matter is very clear that the trial proceeded against VJB Construction Corp. and Kajima Development Corp.

Prior to the trial, the action was discontinued against 475 Ninth Avenue Associates.

What's happening here, your Honor, is a --

THE COURT: And then there was a subsequent settlement?

MR. ROSE: Yes.

Just to be complete, your Honor, there was a subsequent settlement made on the record by

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2 Mr. Devereaux's office who, at the time, was acting
3 as counsel for the only remaining defendants, which
4 were VJB Construction Corp. and Kajima Construction
5 Corp.

6 And the record is clear that a settlement
7 was reached in the amount of \$875,000, to be paid
8 only by those two defendants who were remaining at
9 that time.

10 THE COURT: Which were VJB and Kajima.

11 MR. ROSE: Exactly, your Honor.

12 What is occurring here is that
13 Mr. Devereaux, who represented 475 Ninth Avenue
14 Associates, Kajima and VJB, is now making a thinly
15 veiled attempt on behalf of the carrier that hired
16 him in this matter, Liberty Mutual Insurance, to now
17 recover monies that were never paid on behalf of the
18 defendant, 475 Ninth Avenue Associates.

19 That's the only thing that's occurring
20 here.

21 475 Ninth Avenue Associates, their insurer
22 in this matter is Liberty Mutual International.

23 THE COURT: Yes.

24 MR. ROSE: They never paid a penny on
25 behalf of 475 Ninth Avenue Associates; so all of
26 these other issues are moot.

MLB

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2 MR. REAGAN: Your Honor, we're on the same
3 page. We just want to talk because our points
4 overlap one another.

5 THE COURT: One at a time.

6 Are you going to answer the movant's
7 motion? Is anybody going to answer that?

8 MR. REAGAN: I am, your Honor.

9 THE COURT: Against that background, why
10 don't you just respond to the motion to reargue.

11 MR. REAGAN: Well, my response, again, your
12 Honor, that's why I was asking for the Court's
13 indulgence because there are so many points to be
14 raised.

15 It's moot. There's no standing. This
16 issue shouldn't even be here.

17 THE COURT: Well, can you elaborate for the
18 record.

19 MR. REAGAN: Exactly, your Honor; that's
20 what we were doing.

21 In this case, 475 Ninth Avenue has suffered
22 no loss. Therefore, what are they seeking to
23 accomplish?

24 THE COURT: They are seeking to be
25 indemnified --

26 MR. REAGAN: Exactly. It's a moot point.

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R & J, on their behalf, has paid in full,
so they have not expended any sums.

So for Mr. Devereaux to come here --

THE COURT: Your argument is they have no
standing to seek indemnification, since they have no
loss to be indemnified?

MR. REAGAN: Absolutely, your Honor.

Not only that, the third-party action is
gone because the plaintiff has discontinued.

What we have here is, again, is Liberty
attempting to recoup the funds it expended on
attorney's fees. But there are so many problems with
that, aside from the fact, even if your Honor were to
find questions of fact, okay, and reverse herself,
which would be completely unwarranted under the facts
of the case, but even if you were to do that, what
would that accomplish?

Well, all it would accomplish is that
perhaps VJB could seek to recoup for attorney's fees.
But, again -- excuse me; not VJB; I take that back.
475.

475 has no out-of-pocket expenses; again,
it's Liberty.

Not only that, the funds that Liberty
expended upon its defense were fees that it expended

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on its defense for its main insured, VJB, whose answer has been stricken.

So for 99 percent of the course of this litigation, Liberty has paid on behalf -- the defense costs for VJB and 475.

And if I might -- another point, it's tangential but it's an important point. I said this throughout the course of this litigation. For Mr. Devereaux to sit here and to represent throughout the course of this case, VJB and 475 is such an obvious breach of his obligation, such a conflict of interest because he has two clients whose positions are adverse to one another. It's black letter law.

This is actually a matter that should be brought to the Grievance Committee. I don't need to show any case law. We're all clear.

If you have clients who there's even a potential for an appearance of conflict of interest, you must cease representing both.

Throughout the course of this litigation, VJB had their answer stricken. They are the GC, okay. 475 is property owner who faced statutory liability under Lien Law 240. They had absolutely valid and enforceable claims for indemnification against VJB.

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2 So for counsel to come here to say that
3 he's representing 475 is a sham. He should be
4 removed from counsel and this matter should be
5 referred to the Grievance Committee because this
6 entire proceeding is highly improper, I mean, for so
7 many reasons.

8 I guess I'm going to sit down for now,
9 unless your Honor has any questions, and let anybody
10 else make any points they want to raise.

11 If your Honor wants me to discuss the
12 merits of his argument, I certainly will do so.

13 THE COURT: Very, very briefly.

14 MR. REAGAN: Sure. Okay.

15 As your Honor correctly found, all the
16 deposition testimony establishes that there was
17 complaint after complaint after complaint that there
18 weren't enough workers to clean up the garbage.

19 The garbage was all over the place. The
20 contracts and deposition testimony established That
21 it's VJB's responsibility to remove the garbage. All
22 the trades were required to do was to keep their area
23 generally clean by sweeping it into a central pile on
24 the floor, from which point VJB, their laborers would
25 come; they would pick up the garbage and then they
26 would deposit it or remove it.

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2 However, there were problems with removing
3 the debris.

4 They were trying to get certain floors
5 ready to be inspected for a certificate of occupancy;
6 so what they did is they took all the debris and they
7 brought it up to the floor that the plaintiff was
8 working on at the time of his accident for a period
9 of weeks beforehand and they dumped it there.

10 It wasn't just a piece of BX cable on the
11 floor that Mr. Santoli fell on.

12 The testimony establishes there were pieces
13 of sheetrock; paint cans; there was everything. All
14 the debris you would find at a garbage site all over
15 the place.

16 My client hadn't been on that floor for
17 weeks. So it would be sheer speculation to say that
18 we had anything to do with this.

19 The evidence, as we knew it right now,
20 strongly points to the fact that it was VJB which was
21 negligent. So, factually, this issue is a sham.
22 Procedurally, it's highly improper; and counsel's
23 conduct is, again, is a matter which I would ask your
24 Honor to take a look at because you will see that he
25 has committed such an ethical breach that this matter
26 should be brought up before the Grievance Committee.

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2 MR. DEVEREAUX: Your Honor, may I reply,
3 please, especially to the scurrilous attacks on me,
4 which you have allowed them to make against my
5 character.

6 The only one who has standing right now is
7 me, standing before you, and Spieler.

8 This action was settled vis-a-vis the
9 plaintiff, and the record on the stipulation
10 expressly states at pages 5 and 6:

11 "Every other claim is expressly reserved
12 against every other entity."

13 For him to say I lack standing, it's just
14 the opposite. Everything they say, in terms of
15 statements and arguments, except for the brief
16 statement on the merits regarding this motion I
17 object to and take exception to.

18 THE COURT: Can I ask you this.

19 Has your client -- you're representing 475.
20 Has 475 expended any money on the settlement?

21 MR. DEVEREAUX: Of course they have, your
22 Honor.

23 THE COURT: What was it; other than
24 attorney's fees?

25 MR. DEVEREAUX: In terms of indemnity, your
26 Honor, \$750,000. That's what they expended.

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With all due respect, to say I lack
standing --

THE COURT: When you say \$750,000, that's
not 475 --

MR. DEVEREAUX: That's absolutely 475,
Judge.

THE COURT: Wait, wait, wait.
475, their insurer or they themselves have
paid the settlement?

I'm asking you a direct question.

MR. DEVEREAUX: Yes.

MR. ROSE: Have you paid? Have you?

THE COURT: I'm asking you a direct
question.

Has 475 paid out any money in settlement?

MR. DEVEREAUX: 475, through their
insurance carrier, has paid \$750,000 to settle.

THE COURT: Whose insurance carrier?

MR. DEVEREAUX: 475's insurance carrier,
Liberty International --

THE COURT: Was Liberty their insurance
carrier or Kajima's insurance carrier?

THE WITNESS: Their insurance carrier.
Liberty International Underwriters is the insurance
carrier for 475 Ninth and has been throughout this

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litigation.

THE COURT: Wait a minute. When you say that, do you mean that VJB or Kajima has picked up the defense of 475?

Is that what you're saying?

MR. DEVEREAUX: If your Honor pleases, in that respect; however, they are additional insureds with the same rights as insureds under the Liberty International Underwriters policy.

THE COURT: But they were not the ones that purchased that insurance. It was the subcontractor. Their --

MR. DEVEREAUX: I don't know if that's a correct statement, your Honor.

There are contractual relationships here which require consideration. In effect, they might have paid for it.

I'm going to try to respond to the myriad of statements and arguments made against me, including scurrilous arguments and statements about pretrial settlement discussions, which I believe are totally irrelevant to this motion.

But for them to assert that I have any conflict of interest with my client when I represent zealously my client and they say we, when they have

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2 no standing to represent 475 Ninth at all.

3 R & J's attorney and R & J's carrier never
4 took over the defense and indemnity of 475. They
5 never had any apparent or actual authority to speak
6 on behalf of my client.

7 For them now to make some kind of secret
8 agreement among themselves to say: "We are acting on
9 behalf of 475 Ninth" without me knowing about it is
10 outrageous. That's a conflict of interest.

11 In effect, they're acting contrary to the
12 interests of 475 Ninth, the owner, by trying to say
13 they're acting for them.

14 MR. ROSE: They're out of the case without
15 paying.

16 THE COURT: Please, everybody. Enough.

17 At this point, let me just say this for the
18 record.

19 You know, I looked at the facts. On the
20 facts alone, I'm denying the argument.

21 MR. DEVEREAUX: Could I say one more
22 point --

23 THE COURT: I'm talking about the merits of
24 the argument --

25 MR. DEVEREAUX: I haven't replied to the
26 merits yet because I've been trying --

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THE COURT: Please, Mr. Devereaux. Let everybody -- let me speak.

I am extremely familiar with this case. I have written on this case I don't remember how many times but certainly more than once. I am familiar with the facts. I wrote a lengthy decision in regard to the facts.

We went through the facts very, very carefully, and I believe my determination was appropriate. I don't believe I overlooked any fact. I don't believe I misstated the law; and I am going to adhere to my August 2007 decision.

MR. DEVEREAUX: Your Honor --

THE COURT: On that alone, reargument is denied.

MR. DEVEREAUX: Your Honor, I have no problem with that. I respect your Honor's decision.

However, Judge, they have ambushed me with a myriad of arguments that were not raised in opposition or raised in any way.

Your Honor, this is going up on appeal. I would like to respond.

THE COURT: You may respond however you want, but not on the facts.

MR. REAGAN: Your Honor, may I just have

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2 ten seconds?

3 THE COURT: You can only respond to what
4 you consider attacks on yourself.

5 MR. REAGAN: Your Honor, before he does
6 that, can I just have ten seconds to make a quick
7 point?

8 Counsel is correct; I came in here knowing
9 that he is going to take this up on appeal so,
10 respectfully, what I would request your Honor to do,
11 since we feel that the developments which have taken
12 place since your last order are so important, we
13 would respectfully request that your Honor grant
14 reargument and then, upon reargument, adhere to your
15 prior determination.

16 That way, he can only take an appeal from
17 your denial on reargument, because it subsumes he
18 will not be able to appeal from the original
19 decision; because it's absolutely imperative that we
20 bring all of these matters before the Appellate
21 Division, not merely the underlying motion practice.

22 So by granting reargument and adhering to
23 your prior determination, it will be from this and
24 from, you know, everything globally will be before
25 the Appellate Division.

26 MR. DEVEREAUX: Let me say, your Honor,

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2 with that in mind, I did not merely move to reargue;
3 I moved to vacate because I do want this to go before
4 the Appellate Division. So I would agree with that
5 statement by Mr. Reagan.

6 THE COURT: At this point, then, I will
7 grant reargument and deny the reargument, since
8 everybody wants me to do so -- and deny the motion,
9 deny the motion; and I'm adhering to my original
10 findings of fact and decision on those facts.

11 MR. DEVEREAUX: I thought that's the
12 opposite of what Mr. Reagan said --

13 THE COURT: Strike all of that. Strike it
14 all.

15 At this point, I'm going to do what the
16 parties want.

17 I'm granting reargument and denying the
18 motion now before me.

19 MR. DEVEREAUX: Okay. Judge, I think that
20 ends the matter, except for the scurrilous attacks
21 against me.

22 All of this was irrelevant to the merits of
23 this motion.

24 As was indicated by Mr. Reagan on
25 reargument, he went off, made all these statements on
26 the record and then your Honor said: "Could you

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address the merits, please." The last --

THE COURT: What about the standing issue?

MR. DEVEREAUX: The standing issue with respect to R & J, you're talking about that, because they're in a conflict --

THE COURT: No. I'm talking about 475.

MR. DEVEREAUX: They have absolute standing. They paid \$750,000 through their insurance carrier, Liberty International Underwriters.

Therefore, they have all the rights to seek defense and indemnity from Spieler, R & J and from the respective insurance carriers. That right was expressly reserved on the stipulation of settlement on pages 5 and 6.

This is totally irrelevant to this motion, as we expressly told Mr. Rose and I told R & J's attorney, Veronica Gannon --

Judge, I'm being personally attacked again here. The Judge seems to be going along with the attacks against my character, which are totally irrelevant.

Nobody's saying: "You cannot make those attacks. Stop that. Respectfully, Counsel, address the merits and nothing else."

Veronica Gannon, who I spoke to before the

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